IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 23-0215

PATRICIA TAFELSKI, et al., on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

MARK JOHN, TAMMI FISHER,
Objectors-Appellants,

v.

LOGAN HEALTH MEDICAL CENTER,
Defendant-Appellee.

PLAINTIFF APPELLEES RESPONSE BRIEF

On Appeal from a Final Judgment of the Montana Eighth Judicial District Court, Cascade County
District Court Cause No. ADV-22-0108
The Honorable John W. Parker, Presiding

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TABLE OF CONTENTS

Table of Authorities

Statutes and Rules **Page No.**

Cases

INTRODUCTION

Following an excellent settlement which resulted in substantial monetary and non-monetary relief to the class, Objectors and their counsel advanced baseless allegations of collusion and speculation that Class Counsel's requested fee would result in a "windfall." After giving Objectors ample opportunity to provide evidence and otherwise make their case, the District Court denied the objection and awarded Class Counsel a 1/3 contingency fee, which is routine in Montana and other courts across the country.

In what is essentially "copy and paste" of the overruled objections, Objectors now appeal the final approval order and final judgement, and assert that the District Court abused its discretion by awarding Class Counsel a 1/3 contingency fee and denying Objectors access to settlement discovery. As set forth below, the Objection was (and this appeal is) baseless, and their conduct has negatively affected thousands of class members who would have already received their share of the settlement benefits but for this frivolous appeal. The District Court's decision should be affirmed.

In addition to denying Objectors' appeal under settled law, the Court should sanction Objectors for the harm they have caused the class.

STATEMENT OF ISSUES

Pursuant to Mont. R. App. P. 12(2), Appellees reframe the two issues identified by Objectors for this appeal, and raise a third:

1. Whether the District Court abused its discretion by awarding attorneys' fees of $1,433,333 (1/3 of the Settlement value) over Objectors' speculative objection?

2. Whether the District Court abused its discretion by denying Objectors' motion for discovery relating to the settling parties' confidential settlement negotiations where Objectors presented no evidence of collusion, the Settlement relief exceeded other data breach settlements, and the evidence Objectors intended to compel—proof that the insurance policy was cannibalizing/wasting—was subject to review of the neutral mediator and confirmed by the parties to the District Court?

3. Whether Objectors should be sanctioned pursuant to Mont. R. App. P. 19(5) for appealing without substantial or reasonable grounds and/or for purposes of harassment or delay to the Class?

STATEMENT OF THE CASE

Appellees Patricia Tafelski, Hazel Conway, John Conway, Bonnie Leahy, Timothy Leahy, Mark Reitan, Allison Smeltz, Rhonda Stephens-Block, Jennifer Teich, and Patrick Teich ("Appellees") sued Logan Health Medical Center ("Logan Health") for a data breach first announced on February 18, 2022 (the "Data Security

Incident" or "DSI"). (Dkts. 1, 3, 4, 5). After Appellees consolidated their cases (Dkt. 9), sought and obtained appointment of their counsel as Class Counsel (Dkt. 18), fully briefed Logan Health's motion to dismiss (Dkts. 6, 13), and thoroughly investigated the data breach, the parties settled the dispute on its merits with the assistance of a respected class action mediator, Judge Louis Meisinger. (Dkt. 23).

The District Court reviewed and preliminarily approved the Settlement and ordered that the Notice Program commence to advise the more than 200,000 affected Montanans on how to make a claim, how to opt out, and how to object to the Settlement. (Dkt. 24). Of the over 200,000 class members, only three objected – Objectors Johnson and Fisher as well as their counsel's wife. (Dkt. 30). In contrast, thousands of class members elected to receive the enhanced credit protection and monetary benefits available under the Settlement.

Objectors argued the attorneys' fees Appellees' counsel sought were not warranted. This position is without any support and was rejected by the District Court. Objectors also filed a motion for discovery, asking the Court to permit them to learn more details about the mediation and resulting Settlement overseen by a respected retired judge (the "Discovery Motion"). (Dkts. 31, 32). Appellees and Logan Health opposed the Objection and Discovery Motion. (Dkts. 33 and 35).

The District Court conducted a rigorous final fairness hearing on March 9, 2023. During the hearing, Judge Parker heard evidence and argument from the

parties, considered Mr. Monforton's and his clients' positions, and thereafter denied their Objection, denied the Discovery Motion, and finally approved the Settlement on March 16, 2023 (the "Final Approval Order"). (Dkt. 44). The District Court thoroughly considered the factors before ordering attorneys' fees in the amount of $1,433,333 (1/3 of the Settlement) and declined to utilize a lodestar cross-check. (Dkt. 44). The Court reasoned the Discovery Motion was without merit because Appellees and Logan Health "objectively presented proof that th[e] settlement was the result of arms-length negotiations facilitated by a retired judge serving as mediator" and the requested discovery "would not serve the best interests of the class as it would cause delay in payment and remedies afforded under the settlement to the class, and could expose Objectors themselves to legal risks." (Dkt. 44). Although the objection was baseless and Objectors' positions were rejected by the District Court, they nevertheless filed the instant appeal. It is vexatious and intended to cause delay. Objectors have succeeded in their mission: the frivolous appeal has caused months of delay and has deprived thousands of Montana class members of monetary and non-monetary Settlement benefits.

STATEMENT OF THE RELEVANT FACTS

Following Logan Health's announcement of the DSI, Appellees devoted substantial time and resources to prosecuting this litigation. Appellees filed multiple complaints, self-organized, and responded to Logan Health's motion to dismiss.

(Dkts. 1–13). This effort required extensive investigation of potential legal claims; an investigation of the circumstances surrounding the DSI; drafting two separate complaints; reviewing and analyzing myriad reports, articles, and other public materials discussing the DSI and Logan Health's response; researching Logan Health's corporate structure to identify additional potential co-defendants; and communicating with numerous DSI victims. (Dkt. 34).

Appellees also sought and obtained appointment of their attorneys as Class Counsel, and successfully warded off baseless attempts by other counsel to intervene in this litigation and strip Class Counsel of their leadership roles. (Dkt. 18).

Amidst all these efforts, the parties began engaging in preliminary settlement negotiations, eventually agreeing to formal mediation. The parties' early resolution efforts included a mutual exchange of discovery and other necessary information to inform a productive mediation with Judge Meisinger. (Dkt. 34). Appellees devoted substantial time and resources preparing for the mediation, including reviewing the discovery, preparing a detailed mediation statement, and engaging in pre-mediation discussions with Logan Health. (Dkt. 34).

On July 19, 2022, the parties attended an all-day mediation with Judge Meisinger. (Dkt. 34). Following a hard-fought mediation, the parties were unable to reach an agreement on the amount of the settlement fund. Judge Meisinger worked diligently to gain the parties' perspectives and, equipped with the well-informed

views of the parties, made a double-blind mediator's proposal of $4.3 million non-reversionary common settlement fund. (Dkt. 34). The parties mutually accepted this offer and reached a settlement in principle. Over nearly three months, the parties continued extensive efforts to finalize the Settlement's details and memorialize the Settlement Agreement and supporting documents. (Dkt. 34). The parties' efforts included, *inter alia*: drafting and exchanging multiple revised versions of a lengthy Settlement Agreement; developing the Notice Program in close consultation with the Settlement Administrator; developing the class notices, claim form, and settlement website; and assembling the motion for preliminary approval and supporting documents.

Pursuant to the Settlement, Logan Health agreed to provide comprehensive benefits to settlement class members including: 1) three-bureau credit monitoring (including an option for minor credit monitoring) or an alternative cash payment; 2) reimbursement of expenses related to the DSI; and 3) reimbursement for time spent remedying issues related to the DSI. (Dkt. 23).

Pursuant to MRCP 23, the District Court preliminarily approved the class action Settlement on December 6, 2022, and directed notice be sent to the class to provide information and instruction on the claims process, as well as the procedure to opt-out or object to the Settlement. (Dkt. 24). The approved Notice Program was

commenced and hundreds of thousands of Montanans received notice of the Settlement. (Dkt. 26).

In the Notice Program, Appellees conspicuously informed the class they intended to seek attorneys' fees equal to one-third of the $4.3 million common fund (Dkts. 23, 24). On January 10, 2023, Appellees filed their motion seeking attorneys' fees. (Dkt. 26). Approximately 202,677 class members were notified about the Settlement, and thousands of class members made claims under the Settlement. (Dkt. 30). In contrast, only three class members objected: Objectors Johnson and Fisher (represented by Mr. Monforton) and Mr. Monforton's spouse.

The Objection was vitriolic and rife with unsupported insinuation that the Settlement—overseen by a respected neutral mediator—was the result of collusion because the Objectors were not allowed to see the insurance policy to confirm whether it was a wasting or cannibalistic policy. (Dkt. 30). Without providing a scintilla of evidence to support the collusion allegation, Objectors cherry-picked a handful of cases where one of the appointed class counsel in this case, Mr. Yanchunis, had his requested attorneys' fees reduced and used those cases to speculate this Settlement lacked an arms-length negotiation. (Dkt. 30). Despite Objectors' insistence that the 1/3 attorneys' fees award was excessive, the District Court noted Objectors could not "state what they considered to be a fair and

reasonable payment to Class Counsel, and didn't present any persuasive evidence or argument that a 1/3 common fund payment was not warranted." (Dkt. 44).

On March 16, 2023, following a robust fairness hearing during which the District Court gave Objectors ample opportunity to present evidence to support their positions, the District Court overruled the Objection and awarded Appellees their requested attorneys' fees. (Dkt. 44). The District Court conducted an in-depth analysis of the ten factors from *Gendron v. Montana University System*, 399 Mont. 470 (2020), and concluded that the requested attorneys' fee was reasonable under the percentage-of-recovery calculation. The District Court observed the following: 1) the case was taken on a contingency basis, incentivizing efficiency to obtain maximum relief in light of the wasting insurance policy; 2) the percentage-of-recovery calculation is standard in class litigation; 3) Montana case law lends overwhelming support for approval of a 1/3 contingency fee—including in a data breach settlement that occurred during Objectors' mayoral tenure; 4) the case was complex and novel beyond the scope and capability of a general practitioner; 5) Appellees' uncontroverted record activity in the case sufficiently demonstrated the amount of time and effort expended; 6) the significant risk of non-payment given the case's complexity; 7) the substantial monetary relief and robust security improvements obtained only as a result of counsel, which exceeded other data breach settlements approved by other courts; 8) the imbalance of power and resources

between Logan Health and individuals; 9) the experience, skills, and reputation of counsel to achieve the results secured; and 10) the lucrative work Counsel declined in order to pursue this case. (Dkt. 44). The District Court also affirmed that a lodestar crosscheck "is not required under Montana jurisprudence" and was not "necessary or warranted under the facts of this case." (Dkt. 44).

STANDARD OF REVIEW

The grant or denial of attorneys' fees is reviewed for abuse of discretion. *In re Guardianship of A.M.M.*, 2015 MT 250, ¶ 18, 380 Mont. 451, 356 P.3d 474 (citing *In re Conservatorship of J.R.*, 2011 MT 62, ¶ 77, 360 Mont. 30, 252 P.3d 163). "A district court has abused its discretion if its award of attorneys' fees is not supported by substantial evidence." *Id.* (citing *In re Marriage of Harkin*, 2000 MT 105, ¶ 70, 299 Mont. 298, 999 P.2d 969).

Discovery rulings are also reviewed for abuse of discretion. *Palliser v. Blue Cross and Blue Shield of Montana, Inc.*, 2012 MT 198, ¶ 9, 366 Mont. 175, 285 P.3d 562 (citing *Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 17, 336 Mont. 429, 154 P.3d 1189). Crucially, evidence of collusion is normally required to trigger a discovery request by an objector to a class action settlement. *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000). Even then, objectors "do not have an absolute right to discovery" and a court may limit discovery "to that which may assist [it] in determining the fairness and adequacy of [a] settlement."

Pallister, ¶ 29 (citing *Hemphill v. San Diego Ass'n of Realtors*, 225 F.R.D. 616, 619 (S.D. Cal. 2005)).

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion by awarding Appellees' Counsel a 1/3 contingency fee. Appellees' Counsel pursued and secured an excellent settlement which provides substantial benefits for hundreds of thousands of Montanans whose personal information (including names, dates of birth, Social Security numbers, and other protected health information) was exposed to malicious actors. The District Court agreed that the contingency-based model "incentivized Class Counsel to be efficient with the prosecution of this case and in seeking maximum relief to the class, particularly given the cannibalizing/wasting insurance policy at issue." (Dkt. 44). This Court has explained:

> It is axiomatic that the effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

Wight v. Hughes Livestock Co., Inc., 204 Mont. 98 (1983).

Objectors admit there is no record evidence to suggest Appellees' counsel are not entitled to that contingency-based fee award. (Brief, at 1). Instead, Objectors repeat their unfounded speculation—the foundation of their overruled objection in the District Court—that Appellees' counsel spent "a generous estimate of 300 hours

of billable work" and that "thousands of class members . . . might receive no recovery at all." (Brief, at 1). Not only are these suppositions factually unmerited and contradicted by the robust record docket activity, they also are woefully inadequate under the law. Appellees' Counsel specialize in the narrow and complex data breach and privacy class action space, have repeatedly been recognized as competent and adequate class counsel, and have successfully litigated numerous cases securing similar benefits in comparable cases—including in another data breach in Montana. The District Court appropriately considered Appellees' Counsel's experience, skill, and reputation in this complex and novel space when it awarded them their requested attorneys' fees.

Objectors' personal attacks on Mr. Yanchunis' reputation are unfounded. Mr. Yanchunis is routinely recognized by courts across the country for his expertise, skill, and reputation in data security and privacy cases. (Dkt. 34). That a court in a different state applying that state's law previously exercised its discretion to perform a lodestar crosscheck does not render as error the District Court's same exercise of discretion to decline a lodestar crosscheck.

In attacking Mr. Yanchunis, Objectors also insinuate misconduct by the law firm of Ahdoot & Wolfson, PC ("Ahdoot Wolfson") in previous litigation. (Brief, at 24-25). Like much of Objectors' appellate brief, these positions are virtually copied and pasted from their overruled objections. Ahdoot Wolfson vehemently denies Mr.

Monforton's allegations (whether explicit or implicit). Ahdoot Wolfson has *never* been reprimanded or criticized by any court for time and billing practices and has never been found to have engaged in a "reverse auction" during its more than 25-year history. The *Flagstar* and *Kroger* data breach litigations Objectors reference are no exception. In both of those cases, the arguments were rejected and the requests denied. *See, e.g., Cochran, et al. v. The Kroger Co., et al.*, No. 5:21-cv-01887-EJD, ECF No. 115 (N.D. Cal.) (approving $5 million non-reversionary settlement).

The District Court also did not abuse its discretion by denying Objectors' Discovery Motion. The law is clear: objectors are not per se entitled to discovery in class cases, and only upon a showing of collusion *might* an objector be entitled to discovery if the district court deems it appropriate. Here, Objectors offered no proof of any collusion, the record clearly demonstrates there was no collusion, the parties represented as experienced and respected officers of the Court that the insurance policy was cannibalizing, and the District Court properly found that discovery was not necessary in light of that "clear confirmation" from counsel. (Dkt. 44).

The Court should deny Objectors' baseless appeal *post haste* so the class can finally receive the Settlement benefits which Objectors have needlessly delayed. The Court should sanction Objectors for their baseless appeal that has caused harm to class members.

ARGUMENT

I. The District Court Did Not Abuse its Discretion Granting the Motion for Attorneys' Fees

A. The attorneys' fees motion was properly noticed and disclosed

As an initial matter, Objectors lean heavily into three cases to (wrongly) suggest resolution of attorneys' fees in class actions requires a lodestar crosscheck. (Brief, at 12). Those cases do *not* stand for that proposition. Instead, those cases simply require class counsel seeking attorneys' fees in class actions submit their requests *before the objection deadline*. *Redman v. RadioShack Corp.*, 768 F.3d 622, 637–38 (7th Cir. 2014) (error where attorneys' fees motion was filed after objection deadline); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (same); *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1249 (11th Cir. 2020) (same).

Unlike those cases, Appellees' counsel complied with the District Court's schedule, filed their attorneys' fees motion before the objection deadline, and published that motion to the Settlement Website where all Class Members could review and, if desired, respond to the motion. (Dkt. 26). Appellees' compliance is further evidenced by Objectors' Objection being filed ahead of the objection deadline. (Dkt. 30). No other objections were filed, whether before the deadline, after the District Court granted the attorneys' fees motion, or after the purported "several stories" being published about the attorneys' fees award. (Brief, at 14, n.6).

B. The District Court properly considered and analyzed the *Gendron* factors in awarding the requested attorneys' fees

Objectors concede that the District Court "maintains broad discretion in its selection of the method of calculation and consideration of the guiding factors when awarding fees based on the competent evidence presented." (Brief, at 9) (citing *Gendron*, ¶ 15). This broad discretion is not abused if the attorneys' fees determination is supported by an "adequate rationale." *Id.* (citing *Head v. Central Reserve Life of North Am. Ins. Co.*, 258 Mont. 188, 205 (1993). Moreover, "the experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." *Laffitte v. Robert Half Int'l., Inc.*, 1 Cal.5th 480, 488 (2016).

The District Court correctly concluded that the case was complex and novel, beyond the capacity of general practitioners, and Counsel's contingent representation incentivized efficiency to obtain maximum relief to the class, particularly with a cannibalizing insurance policy. (Dkt. 44). Logan Health denied liability from the beginning and expressed an intention to defend itself through trial; there are few attorneys willing and capable of taking on a case of this nature. (Dkts. 26, 44). Engaging in complex motion practice, discovery, trial, and any appeal to prove liability and secure an executable judgment already presented an inherent risk to continued litigation. (Dkt. 26) (citing *In re Equifax Inc. Customer Data Sec.*

Breach Litig., 2020 WL 256132 (N.D. Ga. Mar. 17, 2020); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, 2019 WL 3773737, at *7 (N.D. Ohio Aug. 12, 2019); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 315 (N.D. Cal. 2018)). Adding to the complexity and risk of non-payment was the cannibalizing insurance policy. The District Court correctly found that these factors weigh in favor of a percentage-of-recovery analysis, particularly given the imbalance of litigation power and resources between Logan Health and class members. (Dkt. 44); *see also Charles I. Friedman, P.C. v. Microsoft Corp.*, 141 P.3d 824 (Az. Ct. Appeals. 2006) (recognizing that the risk of non-payment justified an upward adjustment of attorneys' fees in a class action settlement).

The District Court compared the relief from other data breach settlements with the relief obtained for the hundreds of thousands of Montanans in this case and correctly determined that the substantial monetary relief and robust security improvements obtained—because of Appellees' Counsel's efforts—favored a percentage-of-recovery approach. The Settlement provided approximately $21.22 per class member—one of the higher per capita settlements in data breaches, with actual payouts projected to be even higher—with 3 years of credit monitoring available to any class member who submitted a claim, constituting superior relief on a per-capita basis compared to twelve data breach settlements approved during the past decade. (Dkts. 34, 44).

The District Court also correctly observed that the percentage-of-recovery calculation is standard in class litigation, and an overwhelming body of Montana law supports 1/3 contingency fees—including the data breach settlement from Objector counsel's mayoral tenure. (Dkts. 26, 44) (citing *Henderson v. Kalispell Regional Healthcare*, No. CDV-19-0761, awarding as reasonable 1/3 attorneys' fees from $4.2 million common fund; Mr. Monforton did not object); *Sones v. Rimrock Engineering, Inc.*, No. DV 19-0575 (finding a 1/3 contingent fee from $3.45 million common fund reasonable); *Hageman v. AT&T Mobility*, No. CV-13-50-DLC-RWA (finding a 1/3 contingent fee from $45 million fund reasonable); *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804 (C.D. Cal. Nov. 18, 2014) (awarding 1/3 attorneys' fees from common fund because the heightened risk and good result commanded a larger percentage fee). While courts *may* employ a lodestar crosscheck, that decision is within the court's discretion, and Objectors offer zero evidence to demonstrate why the District Court's well-informed decision to forego a lodestar crosscheck constitutes an abuse of discretion in light of well-established jurisprudence.

The District Court also considered and correctly held Appellees' uncontroverted record activity in the case adequately demonstrated the amount of time and effort expended. (Dkt. 44). Objectors brought only rank speculation, failing to proffer any evidence—whether by expert testimony or any other means—that the record activity was insufficient to demonstrate Appellees' counsel devoted

substantial time and resources to the case. (Dkt. 30). While Objectors would have this Court believe the litigation was resolved in a "matter of weeks," the record demonstrates the parties engaged in significant motion practice, exchanged discovery, prepared for and attended mediation, and even with that substantial work, it took a mediator's $4.3 million double-blind proposal to settle the case. (Dkt. 44).

Appellees' counsel's job was not done after settling in principle. For weeks thereafter, the parties engaged with Logan Health's counsel to finalize settlement negotiations and details. Then, the parties worked to formalize the terms of the settlement, notice plan, and other matters over a period of nearly three months to finalize the Settlement Agreement and bring substantial and robust relief to affected Montanans. (Dkt. 44).

Finally, the District Court properly considered the experience, skill, and reputation of Class Counsel to achieve the results secured and recognized the lucrative work they declined to pursue this case. (Dkt. 44). Appellees' Counsel enjoy a nationwide reputation for pursuing some of the toughest and most complex privacy cases. The District Court considered that experience, skill, and reputation when it appointed Appellees' Counsel as interim class counsel. (Dkt. 18). Objectors' criticisms of Mr. Yanchunis amount to cherry-picked orders irrelevant to this litigation. Objectors also wholly ignore the body of privacy litigation Appellees' Counsel have pursued over decades of practice, recovering billions of dollars in

monetary relief for consumers including in: *In re Capital One Consumer Data Security Breach Litigation*, No. 1:19-md-2915-AJT (E.D. Va.) ($190 million settlement); *In re Yahoo! Inc. Customer Data Security Breach Litigation*, No. 5:16-md-2752-LHK (N.D. Cal.) ($117.5 million settlement); *In re: The Home Depot, Inc. Customer Data Security Breach Litigation*, No. 1:14-md-2583-TWT (N.D. Ga.) ($29 million settlement); *In re: Equifax, Inc. Customer Data Security Breach Litigation*, No. 1:17-md-2800-TWT (N.D. Ga.) ($380.5 million settlement); *see* (Dkts. 9, 10, 18, 44); *In re Zoom Video Communications, Inc. Privacy Litigation*, No. 5:20-cv-02155-LHK (N.D. Cal.) ($85 million settlement); *Rivera v. Google LLC*, No. 2019-CH-00990 (Ill. Cir. Ct.) ($100 million settlement); *Experian Data Breach Litigation*, No. 8:15-cv-01592-AG-DFM (C.D. Cal.) ($150 million settlement value). The District Court rightly recognized that Appellees' Counsel's time and resources are finite, and that this case caused them to forego other litigation. (Dkt. 44).

The District Court's exercise of discretion in declining to apply a lodestar crosscheck is abundantly reasonable given the robust record considered. (Dkt. 44).

C. The Settlement is clearly non-collusive

Objectors' suggestion of collusion to settle this case is baseless and patently offensive. First, "[i]n the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient

information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship.*, 151 F.3d 1234, 1239 (9th Cir. 1998). Sufficient discovery takes place where the parties exchange adequate information to apprise themselves of their case's strengths and weaknesses. *Mondrian v. Trius Trucking, Inc.*, 2022 WL 6226843, *8 (E.D. Cal. Oct. 7, 2022). The core focus is whether the parties carefully investigated the claims before reaching a resolution.

Second, as the District Court noted—and Objectors have no basis to dispute—the mediation initially resulted in impasse. (Dkt. 44). Only after the mediator's double-blind $4.3 million proposal (and weeks of continued negotiations) did the parties resolve the case and sign the Settlement Agreement. (Dkt. 44). The record demonstrates this is not the kind of case where the parties agreed to resolution before mediation. Instead, the parties engaged in substantial pre-mediation discovery and engaged in the unsuccessful day-long mediation. The case only settled *after* the mediator's proposal. (Dkt. 44). The negotiations were at arms-length without collusion. *See, e.g.*, *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (engaging in formal mediation with an experienced mediator favors "a finding of non-collusiveness"); *Swain v. Anders Group, LLC*, 2022 WL 5250139, *10 (E.D. Cal. Oct. 6, 2022) (same) (quoting *Adoma v. Univ. of Phx., Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (cleaned up)); *see also Mondrian*, 2022 WL 6226843, *8 (same).

Finally, the Settlement is non-reversionary, weighing heavily against any suggestion of collusion. Cases where courts have identified "subtle signs" of collusion include those where the defendant is set to recover some of the settlement fund through a reversionary agreement. *See, e.g., Zwicky v. Diamond Resorts Mgmt. Inc.*, 343 F.R.D. 101 (D. Az. Nov. 15, 2022) (rejecting settlement without prejudice to re-file and correct, inter alia, "subtle signs" of collusion); *Maree v. Deutsche Lufthansa AG*, 2022 WL 5052582, *4 (C.D. Cal. Sep. 30, 2022) (denying claims-made settlement due to the "clandestine" nature of settlement negotiations conducted without any formal discovery). Not even "subtle signs" of collusion exist here.

II. There is No Evidence a "Windfall" was Awarded to Class Counsel

This is not a billion dollar or mega fund case where "rote application of [a percentage-of-recovery] benchmark would yield windfall profits for class counsel[.]" *In re Bluetooth*, 654 F.3d at 942; *see, e.g.*, *In re Yahoo!*, 2020 WL 4212811 (N.D. Cal. July 22, 2020) (declining application of the percentage-of-recovery method). The cases Objectors cite all involved trial courts exercising their discretion to upwardly or downwardly adjust attorneys' fees based on a complex set of factors—just as the District Court did in this case. It is immaterial that a court in another jurisdiction 14 years ago reduced an attorneys' fees award (*see* Brief, at 16), or that one of Mr. Yanchunis' numerous class action settlements resulted in a reduced attorneys' fees award. (*Id.*). What is relevant is the routine practice of Montana

district courts, and the District Court properly considered the routine approval of attorneys' fees in class action settlements based on percentage-of-recovery analyses. *See, supra,* § I(B) (citing Montana trial court decisions approving attorneys' fees of 1/3 for class action data breach settlements). Objectors' unfounded speculation that only 300 hours were devoted to this case is simply wrong and should be rejected, as it was by the District Court.

III. The District Court Properly Considered and Denied Objectors' Requested Discovery

Objectors are not per se entitled to discovery in class action settlements. *Pallister*, 2012 MT 198, ¶ 29 (citing *Hemphill*, 225 F.R.D. at 619). In *Pallister*, the details of the class action settlement were only provided *on the morning of the Fairness Hearing*. *Id.* at ¶ 34. Withholding that information "arguably impaired the court's ability to determine in a comprehensive manner whether the settlement was 'fair, reasonable and adequate.'" *Id.* There clearly must be "sufficient information provided to the class representatives, any objectors, and the district court to enable the parties and the court to reach a well-informed decision of whether the proposed settlement is fair, adequate and reasonable." *Id.* at ¶ 35.

Here, ample notice of the Settlement Agreement, the Settlement's terms and proposed benefits to the class, and the proposed attorneys' fees were provided to the class. These details were enumerated in the Motion for Preliminary Approval, filed on October 26, 2022, approved by the District Court on December 6, 2022, and

published on January 3, 2023 to the Settlement Website for class members, attorneys general, regulators, and the public to review. Of the 6,886 unique visitors to the Settlement Website, only Objectors (roughly 0.03% of the Class) expressed any level of concern. (Dkt. 34). That 0.03% is generous; more than 202,000 class members were noticed—dwarfing Objectors' position to 0.0009% of the class.

Further, Objectors are incorrect—there was no "stipulation" from Logan Health for appointment of interim class counsel. (Brief, at 27). Logan Health's response to the collusion accusations, both then and now, are consistent and resolute: Logan Health took no position for that appointment. (*See* Dkt. 35). Instead—confirming the wasting nature of the insurance policy—Logan Health reaffirmed it "preferred to avoid duplicative litigation" and mediation was conducted "with issues of comity and judicial economy in mind." (Dkt. 35).

Despite this, Objectors sought two categories of discovery: 1) Class Counsel's billing records; and 2) confirmation that the insurance policy was cannibalizing. (Brief, at 21–28). However, as the District Court recognized, Objectors "did not present any evidence of collusion." Instead of justifying this discovery with any evidence of collusion, Objectors cast unsupported aspersions on Class Counsel. (Brief, at 21–28). The District Court correctly rejected Objectors' aspersions and concluded there was no collusion: discovery was exchanged, the mediation was conducted at arms-length and resolved through the mediator's double-blind

proposal, and the settlement is non-reversionary. *See, supra,* § I(C). Furthermore, with respect to the insurance policy in question, the District Court concluded: "Messrs. Paoli, Heenan, and Zadick all confirmed on the record that the policy is an eroding policy. As officers of this Court, I am satisfied with their clear confirmation and no further discovery on this issue or any other discovery is necessary or permitted by Objectors." (Dkt. 44). Objectors failed to carry their burden with the District Court then and similarly fail to carry their burden here on appeal.

IV. Arguments About "Windfalls" Are Unfounded and Intended to Inflame What is Otherwise a Straightforward Application of the Law

The suggestion that Appellees "anticipated a more favorable review of their fee motion in state court than they would have received in federal court" is groundless and should be rejected. Objectors' selective reliance on *Lawler v. Johnson* is telling. (Brief, at 30). In *Lawler*, the Supreme Court of Alabama remanded an attorneys' fee award because although the record clearly evidenced class counsel had expended "thousands of hours of time," the court questioned whether that was the result of class counsel's own delay and ineffectiveness. 253 So.3d 939, at 953 (Ala. 2017). Due to a concern that class counsel was "initially duped in the original settlement," spent substantial time "unsuccessful[ly] . . . avoid[ing] the class-certification process," and exhibited other problematic behavior, a closer review of class counsel's time was warranted. *Id.* Putting aside that Alabama case law is not binding on this Court, that objectively is not the case here. Objectors

instead accuse Appellees' Counsel of being *too competent*, achieving an excellent settlement with robust benefits after seven months of litigation.

Here, there is no evidence to suggest any incompetence on the part of Appellees' counsel (indeed, Objectors suggest the contrary). The record instead demonstrates Appellees' Counsel devoted significant time and resources to secure excellent benefits for class members, and the District Court's discretionary decision to not apply a lodestar crosscheck *in this case* cannot be read as the cautionary tale Objectors implore with absolutely no evidence.

V. Objectors Should be Sanctioned for Baseless Attacks and Delay

Rule 19(5), M.R.App.P., expressly allows for sanctions including but not limited to "attorneys fees" or "other monetary penalty" when an appeal is determined to be frivolous, including when an appeal is "taken without substantial or reasonable grounds" or "for purposes of harassment or delay." This Court has invoked Rule 19(5) repeatedly to impose sanctions. *See, e.g., Hedstrom v. Peters,* 2022 MT 210N (imposing sanctions for frivolous appeal); *In re Estate of Boland,* 2019 MT 236 (same).

The very same day that the District Court rejected Objectors' objections, Objectors and their counsel were quoted in the press criticizing the District Court, lamenting the "attacks on Monforton," arguing they were "pawns in political and court games," and stating they "planned to appeal." (Dkt. 45.)

These incendiary comments followed the District Court having already addressed the Objector's lack of evidence to pursue their baseless course and risk they faced:

> Objectors' Motion for Discovery is denied in whole. Objectors' offered authority in support of the Motion for Discovery, *Pallister,* is factually distinguishable as Objectors did not present any evidence of collusion. Plaintiffs and Defendant objectively presented proof that this settlement was the result of arms-length negotiations facilitated by a retired judge serving as mediator. The requested discovery by Objectors would not serve the best interests of the class as it would cause delay in payment and remedies afforded under the settlement to the class, and could expose Objectors themselves to legal risks.

Dkt. 44

But for Objectors' frivolous appeal, class members already would have received the Settlement benefits. The Settlement Administrator submitted a declaration explaining costs associated with Objectors' objection will exceed $18,000. (Dkt. 45.) The Court should sanction Objectors pursuant to Rule 19(5).

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court affirm the District Court's judgment and sanction Objectors for a frivolous appeal which has substantially delayed thousands of class members receiving settlement benefits.

DATED: September 1, 2023

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word is exactly [5707] words, excluding the caption page, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

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